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No. 90-1718

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama,

Petitioners,

against

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Brief of the State of New York as Amicus Curiae in Support of Petitioners.

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Question Addressed

In enacting the Superfund Amendments and Reauthorization Act, did Congress authorize states to manage the interstate flow of hazardous wastes in order to meet the federally-mandated requirement that states demonstrate longterm capacity for disposal of such wastes?

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Brief of the State of New York as Amicus Curiae in Support of Petitioners

Interest of Amicus Curiae

The State of New York submits this brief in support of the State of Alabama's petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in

National Solid Wastes Management Association v. Alabama Department of Environmental Management, 910 F2d 713 (11th Cir., 1990).

The State of New York has a substantial interest in the outcome of this case. Like Alabama, New York has a large commercial hazardous waste disposal facility within its borders. The New York facility is the only one in the northeastern United States. In the fall of 1989, it became apparent to New York officials that other Northeastern states intended to meet the capacity assurance obligations mandated by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §9604(c)(9) ("SARA") simply by continuing to utilize New York's disposal capacity, in lieu of expanding their own capacity as envisioned by SARA.

In response, New York Commissioner of Environmental Conservation Thomas C. Jorling announced his intention to manage the flow of hazardous wastes sent from other states through cooperative agreements with individual states. Each agreement will require that New York industries be allowed to send wastes to on-line facilities in the cooperating state; further, such state must commit to impose waste reduction requirements on its generators and transporters equivalent to requirements contained in New York law.[1]

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[1]New York has one of the most aggressive hazardous waste reduction laws in the nation. *See,* Environmental Conservation Law §§§ 27-0907, 0908 and 0913. These provisions require hazardous waste generators to audit their operations and to implement waste reduction measures to the maximum extent practicable. Stiff penalties are imposed for noncompliance. Ultimately a recalcitrant generator could be forced to curtail operations because it could not issue the certifications necessary to transport hazardous waste for disposal. This program reflects New York's preferred hazardous waste management hierarchy, codified at Environmental Conservation Law § 27-0105, which calls for: (1) reduction or elimination of hazardous wastes that continue to be generated; (2) reuse and recycling of hazardous wastes that continue to be generated; (3) use of detoxification, treatment or destruction technology; and (4) phasing out land burial of hazardous wastes except for treated residuals posing no significant threat to public health or the environment.

New York subsequently imposed these restrictions in a proposed permit modification to the New York land disposal facility. The operator of that facility, Chemical Waste Management, then filed suit in the Western District of New York on December 18, 1990, asserting *inter alia,* that New York's proposed modifications violate the commerce clause. *National Solid Wastes Management Association and CWM Chemical Services, Inc. v. Jorling,* 90-CV-1288A. The Commissioner has defended on the ground that SARA's capacity assurance provisions authorize New York's proposed restrictions on interstate commerce.

The State of New York respectfully urges this Court to grant *certiorari,* reverse the lower court's decision, and decide that in enacting SARA, Congress authorized states to manage interstate commerce in order to meet the federally-mandated capacity assurance obligations.

Summary of Argument

The Superfund Amendments and Reauthorization Act of 1986 (SARA) expressed Congress' displeasure with the failure of many states to site new hazardous waste facilities, and addressed the "Not-in-My-Backyard" problem by requiring *all* states to demonstrate that they will have adequate in-state and out-of-state resources for disposing of all wastes generated within the state for the next two decades. In enacting SARA, Congress authorized states to manage out-of-state access to waste disposal facilities in order to meet these mandated capacity assurance requirements. Finally, the Holley Bill, passed by Alabama to ensure it would meet its capacity assurance obligations, is consistent with the Congressional authorization contained in SARA.

Argument

Congress enacted the capacity assurance provisions in SARA to force states to site new, state-of-the-art hazardous waste treatment facilities designed to safely handle wastes that industry continues to generate. By rejecting Alabama's claim that SARA authorized the restrictions contained in the Holley Bill, the lower court precluded Alabama from protecting its valuable disposal capacity from states that are content to continue to export unreasonable quantities of hazardous waste without regard to their own siting obligations. Review by this court is necessary to determine the ability of states to manage out-of-state hazardous waste imports in order to meet their federally-mandated capacity assurance requirement.[2]

A. In enacting the capacity assurance provisions of SARA, Congress authorized states to manage the interstate flow of hazardous waste to meet their assurance obligations.

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.* ("CERCLA") in order to ensure cleanup of inactive hazardous waste sites. CERCLA established liability standards for persons responsible for cleanups and

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[2]Although Alabama argued in the lower court that SARA authorizes the Holley Bill, *see*, 910 F2d at 721-22, petitioners have apparently not included this issue in their petition for *certiorari*. Instead they have opted to focus on their constitutional claim. *See*, "Questions Presented" in Alabama's petition. In light of this Court's time-honored practice of not reaching constitutional issues, *see, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them"), the State of New York respectfully suggests that, in the event *certiorari* is granted, the Court can reverse the lower court on the nonconstitutional ground that the Holley Bill is authorized by Congress' enactment of SARA.

created a "Superfund" for use when responsible parties do not carry out cleanups. *See,* 42 USC § 9601, *et seq.*

Congress reauthorized CERCLA in 1986, enacting the Superfund Amendments and Reauthorization Act ("SARA"), P.L. No. 99-499. Because Congress concluded that few states had developed programs to assure safe disposal capacity for hazardous waste which continues to be generated by industry, it enacted a capacity assurance provision ("CAP"), codified at § 104(c)(9) of SARA, 42 USC § 9604(c)(9). This provision directed each state to demonstrate to the United States Environmental Protection Agency ("EPA") that the state will have adequate capacity available to dispose of the hazardous wastes generated within the state for the next twenty years.

The legislative history of SARA demonstrates that the intent behind the capacity assurance obligations was to ensure adequate siting of new, state-of-the-art hazardous waste management facilities across the country. *See,* S. Rep. No. 11, 99th Cong, 1st Sess. 22 (1985):

> "Pressures from local citizens place the political system in an extremely vulnerable position. . . . The broader social need for safe hazardous waste management facilities often has not been strongly represented in the . . . process [of creating new facilities]. A common result has been . . . no significant increase in hazardous waste capacity over the past several years."

Similarly, Senator Chafee, the sponsor of the CAP provision, stated on October 3, 1986 (the date upon which the legislation passed the Senate) that:

> "The objective of the siting amendment is to *force* states to provide safe and adequate facilities for toxic and hazardous waste."

132 Cong. Rec. S. 14924 (emphasis supplied).

Congress recognized that not every State would be able to create new disposal facilities or otherwise manage its waste within its own borders for the next twenty years. Thus, states have the option of using capacity outside of their state in accordance with agreements with other states. If EPA determines that state capacity certifications are not adequate, the State is prohibited from receiving Superfund money for hazardous waste site cleanups taken within the State. 42 USC § 9604(c) (9).

The CAP amendments thus contain two important elements: first, they force states to plan for and develop safe disposal or treatment capacity for all hazardous waste generated for a twenty year period; second, to the extent a State uses disposal facilities outside the state, it can only do so pursuant to an interstate or regional agreement with the states in which such facilities are located. As such, Congress has authorized states to manage out-of-state access to waste disposal facilities which such states are dependent upon to meet their capacity assurance requirements.

While Congressional consent for states to impede commerce must be clear, there is no "talismanic significance" to any particular method of demonstrating Congressional authorization. *South Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 90 (1984). This Court has identified three ways in which such consent may be established: (1) from Congressional intent, *see, Wunnicke, supra* at 92-93; (2) through an evaluation of federal policy, *Wunnicke* at 88; and (3) based upon a course of conduct, *Wardair Canada, Inc. v. Florida Department of Revenue,* 477

U.S. 1, 10 (1986). Significantly, once Congress has authorized state regulation of interstate Commerce, *any* action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge. *Western and Southern Life Insurance Co. v. State Board of Equalization of California,* 451 U.S. 648 (1981).

As demonstrated above, Congress determined that it was in the national interest to ensure development by the states of safe, long-term disposal capacity for hazardous waste which continued to be generated nationwide. In enacting the CAP provisions, Congress intended to *force* states to develop such capacity, and threatened states with the loss of Superfund cleanup monies in the event of failure. The only way for states to avoid this drastic penalty is to regulate the flow of waste to the capacity that exists within their state—the Emelle landfill in Alabama's case. Any other construction of SARA would prevent a State from managing and predicting capacity, and would ultimately subject it to the loss of Superfund dollars.

B. The Holley Bill is consistent with the Congressional authorization to the states contained in SARA.

Finally, the Holley Bill, enacted by Alabama to satisfy its federally-mandated CAP obligations, is consistent with the authorization conferred by Congress in SARA. The bill assists in forcing the development of new capacity because it limits access to Alabama's Emelle disposal facility and forces states previously dependent upon Emelle to address their fair share of the national waste management problem. By being forced to site facilities, as contemplated by Congress, a State has capacity for some types of wastes which it can then use to "bargain" with other states which have other types of facilities (e.g., landfills, incinerators, recy-

cling plants) so as to assure the execution of interstate agreements.

CONCLUSION

For the foregoing reasons, the State of New York respectfully urges this Court to grant certiorari and reverse the decision of the lower court.

Dated: Albany, New York
June 3, 1991

Respectfully submitted,

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